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8 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

9 RODNEY E. AKINS,

10 Plaintiff,

11 v.

12 PENNY HEDGECOTH, an individual,)
MATTHEW TORRES, an individual,)
13 and DOES 3, 5-10,)

14 Defendants.)

) Case No.: 12cv576 BTM (WVG)

) **ORDER GRANTING DEFENDANTS'**
) **MOTION TO DISMISS IN PART AND**
) **DENYING IN PART**

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16 After partially surviving one sua sponte dismissal and three motions to
17 dismiss, the Court granted Plaintiff, Rodney E. Akins leave to amend his
18 single remaining claim based on Defendants' alleged violation of his civil
19 rights under 42 U.S.C. § 1983. Plaintiff amended his complaint a fourth time,
20 and Defendants have filed their fourth motion to dismiss (Doc. 61). For the

1 reasons discussed below, Defendants' motion is GRANTED in part, and
2 DENIED in part.

3 **I. Background**

4 Plaintiff continues his suit against the two remaining Defendants, Penny
5 Hedgecoth and Matthew Torres, in their individual capacities as, respectively,
6 a Mail Room Supervisor and a Campus Security Officer at San Diego
7 Community College ("College"). The background facts of this case are well
8 documented in the Court's May 29, 2014, Order Granting Defendant's Motion
9 to Dismiss Plaintiff's Third Amended Complaint ("TAC") (Doc. 58). The May
10 29, 2014 Order granted Plaintiff leave to amend only his § 1983 claim and
11 instructed that Plaintiff must: (1) clearly articulate which "rights, privileges, or
12 immunities secured by the Constitution and laws," Defendants' conduct
13 violated under 42 U.S.C. § 1983, and; (2) support any civil rights claim with
14 specific facts showing that he plausibly suffered discrimination on the basis of
15 age, race or in retaliation for filing previous complaints. Plaintiff's account of
16 the facts giving rise to the current action has changed only slightly from the
17 TAC, and the pertinent changes are summarized below.

18 First, Plaintiff has added that "it was common knowledge on campus the
19 plaintiff [sic.] was being harassed and filing more than one lawsuit against
20 the district and was basically ignored by school administrators" (Fourth

1 Amended Complaint (“FAC”) ¶ 20). This is the reason the Plaintiff decided to
2 wait to serve his court papers until after classes had ended for the semester
3 (FAC ¶ 20). Second, Plaintiff added a description of the mail room where the
4 allegedly discriminatory events took place; the mail room is located in the
5 “Mesa College Reprographic Center,” where students are able to drop off
6 assignments in a basket “labeled student mail drop,” which employees
7 distribute into faculty members’ individually labeled boxes not directly
8 accessible to the students (FAC ¶ 23). Third, Plaintiff added that upon
9 placing a stack of envelopes containing service of process papers in the
10 basket, he asked the person behind the counter for a receipt, presuming that
11 person to be a College employee (FAC ¶ 24).

12 Plaintiff was then told that he would have to go next door to the faculty
13 and employee mail room for a receipt. He retrieved his envelopes from the
14 basket and proceeded next door, initiating his encounter with Hedgecoth, who
15 he claims attempted to deter him from completing service of process (FAC ¶¶
16 28, 33). Plaintiff now states that after Hedgecoth told him that the faculty and
17 employee side of the mail room he wished to access was not for students and
18 that the mail boxes were closed, she asked Plaintiff whether he “was serving
19 papers,” to which he untruthfully responded, “no” (FAC ¶ 30). Plaintiff alleges

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1 that Hedgecoth then called the campus police only to prevent Plaintiff from
2 leaving his envelopes in the mail room and completing service of process.

3 The only new allegations against Hedgecoth consist of unsupported
4 legal conclusions, such as: Hedgecoth “has a fiduciary duty as a District
5 employee to be courteous and helpful to students;” her actions were an
6 “obvious blatant abuse of her authority and breaking the law;” the “in basket
7 on Campus [sic.] was the same as depositing mail in a U.S. postal mailbox;”
8 the College “employees in the reprographic center were bound by the same
9 laws as postal employees,” and; Plaintiff knew that Hedgecoth “was lying
10 about the mail room being closed,” because he saw people using it at the
11 same time and knew that it was available to students late in the evening
12 based on his previous experience as a College maintenance employee (FAC
13 ¶¶ 30, 36, 39). Plaintiff’s allegations against Officer Torres remain
14 unchanged from the TAC, and continue to state Torres unlawfully detained,
15 falsely imprisoned, “manhandled” and handcuffed Plaintiff, causing him
16 permanent injury (FAC ¶¶ 43-46, 51-52).

17 In addition to the above mentioned additions to Plaintiff’s factual
18 allegations, the FAC also raises five new “counts” under § 1983, grounded in
19 alleged violations of Plaintiff’s First, Fourth, Eighth, and Fourteenth
20 Amendment rights under the United States Constitution. Plaintiff’s prayer for

1 relief remains unchanged and seeks general, compensatory, and punitive
2 damages in the amount of five million dollars, equitable relief, and
3 compensation for the cost of suit (FAC pp. 28-30).

4 **II. Legal Standard**

5 The F.R.C.P 12(b)(6) standard was previously articulated in the Court's
6 May 29, 2014 Order. In summary, 12(b)(6) provides a defense against
7 complaints which "fail[] to state a claim upon which relief can be granted" and
8 a "Rule 12(b)(6) motion tests the legal sufficiency of a claim." Navarro v.
9 Block, 250 F.3d 729, 732 (9th Cir. 2001). When reviewing a motion to
10 dismiss, the allegations of material fact in plaintiff's complaint are taken as
11 true and construed in the light most favorable to the plaintiff. See Parks Sch.
12 of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although
13 detailed factual allegations are not required, factual allegations "must be
14 enough to raise a right to relief above the speculative level." Bell Atlantic v.
15 Twombly, 550 U.S. 544, 555 (2007).

16 **III. Analysis**

17 Defendants argue that Plaintiff's amended § 1983 claims contained in
18 the FAC fail to state a claim because of insufficient factual allegations.

19 42 U.S.C. § 1983 provides in relevant part that:

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1 Every person who, under color of any statute,
2 ordinance, regulation, custom, or usage, of any State
3 or Territory or the District of Columbia, subjects, or
4 causes to be subjected, any citizen of the United
5 States or other person within the jurisdiction thereof to
the deprivation of any rights, privileges, or immunities
secured by the Constitution and laws, shall be liable to
the party injured in an action at law, suit in equity, or
other proper proceeding for redress.

6 Defendants argue that Plaintiff's § 1983 civil rights action for alleged
7 deprivation of Plaintiff's First, Fourth, Eighth, and Fourteenth Amendment
8 rights is deficient because it makes "factual allegations [that] are once again
9 speculative, implausible, and rely on legal conclusions, in addition to going
10 beyond the leave provided by the court by expanding and adding new civil
11 rights violations than previously asserted . . ." (Doc. 61-1, p. 4). While the
12 FAC adds five alleged "counts" of violations, all of them appear to be couched
13 in the language of a civil rights claim arising under § 1983 and are therefore
14 permitted by the Court's May 29, 2014 Order. Nonetheless, having examined
15 the differences between Plaintiff's TAC and FAC, and for the following
16 reasons, the Court finds Plaintiff's factual allegations insufficient to state a
17 § 1983 claim for civil rights violation under the First or the Eighth
18 Amendments as well as the Due Process and Equal Protection clauses of the
19 Fourteenth Amendment, but sufficient to state a claim of unlawful search and
20 seizure and excessive force under the Fourth and Fourteenth Amendments

1 against Officer Torres. Therefore, Defendants' Motion to Dismiss the FAC is
2 GRANTED in part and DENIED in part.

3 As a preliminary matter, contrary to Defendants' assertion, Plaintiff's
4 Memorandum in Support of his Opposition to Defendants' Motion to Dismiss
5 the FAC is timely in light of the Court's August 27, 2014 Order granting
6 Plaintiff's Motion for Extension of Time (Docs. 65, 67). Plaintiff's
7 Memorandum in Support of his Opposition to Defendants' Motion to Dismiss
8 argues that Defendant Hedgecoth denied him the use of public
9 accommodations in violation of the Civil Rights Act of 1964 in retaliation for
10 Plaintiff's previously filed grievances and law suits, in order to prevent him
11 from serving process in the current action, and because she was motivated
12 by racial animus against Plaintiff. However, Plaintiff fails to state any new
13 facts that could raise a non-speculative right to relief against Hedgecoth
14 under § 1983. See Twombly, 550 U.S. at 555.

15 First, Plaintiff does not state any facts to support his conclusion that
16 Hedgecoth's actions were motivated by racial and age prejudice, or done in
17 retaliation for Plaintiff's past or current legal actions. Plaintiff's version of the
18 facts gives no inkling of proof to support his assumption that Hedgecoth knew
19 that he previously filed claims against the Defendants. In fact, Plaintiff
20 contradicts his own conclusion when he states that he lied to Hedgecoth

1 when he denied that he was “serving papers” in the mail room the day the
2 events complained of took place (FAC ¶ 30). Similarly, Plaintiff’s statements
3 calling Hedgecoth a “racist” and accusing her of acting with racial animus
4 against Plaintiff are factually unsupported by any statement or action Plaintiff
5 attributes to Hedgecoth (FAC ¶ 43).

6 A. Count One

7 Plaintiff’s First Amendment claim is based on the assertion that
8 Hedgecoth deprived him of the right to communicate via mail when she
9 removed the envelopes he had deposited in the student mail basket and
10 handed them to a campus police officer to give back to Plaintiff, who was
11 handcuffed at the time (FAC ¶ 55). Plaintiff compares the basket in the
12 campus mail room to a U.S. postal mailbox, and argues that the College mail
13 room employees, including Hedgecoth, are “bound by the same laws as
14 postal employees” (FAC ¶ 39). Plaintiff neither cites what these “laws” are,
15 nor explains how they were violated when Hedgecoth turned over his
16 envelopes to a campus police officer after Plaintiff himself told that officer that
17 he was going to go back to the mail room to retrieve them shortly after being
18 stopped (FAC ¶ 42). Additionally, Plaintiff cites no case law, and the Court is
19 unaware of any, supporting Plaintiff’s legal assertion that campus mail is
20 governed by the same laws and/or regulations as the U.S. Postal Service.

1 Therefore, Plaintiff fails to state facts sufficient to support a § 1983 claim
2 grounded in the First Amendment against both Defendants, and Count One of
3 the FAC is DISMISSED.

4 B. Count Three

5 Taking Plaintiff's factual assertions as true and reading them in a light
6 most favorable to him, the Court also finds that Plaintiff's cruel and unusual
7 punishment claim also fails to meet the 12(b)(6) pleading standard. Plaintiff
8 fails to support his argument that his stop and detention by Officer Torres
9 amounts to "cruel and unusual punishment" with case law or statute, and
10 simply makes naked, conclusory, repetitive and legally insufficient
11 accusations to the effect that "the-defendant-unlawfully-harmed-me." See
12 Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009). Eighth Amendment scrutiny
13 is applicable only after the state has secured a formal adjudication of guilt
14 against a criminal defendant and is entirely inappropriate on the facts alleged
15 in this case. See City of Revere v. Mass. General Hosp., 463 U.S. 239, 244
16 (1983). Therefore, Plaintiff fails to state facts sufficient to support a § 1983
17 claim grounded in the Eighth Amendment against both Defendants, and
18 Count Three of the FAC is DISMISSED.

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1 C. Counts Four and Five

2 Plaintiff's attempts to raise Fourteenth Amendment Due Process and
3 Equal Protection claims based on allegations that he was denied use of a
4 public accommodation and stopped from serving process are also legally
5 deficient. While Plaintiff cites seminal case law such as Board of Regents v.
6 Roth, 408 U.S. 564, 570-71 (1972) and Mullins v. Oregon, 57 F.3rd 789, 795
7 (9th Cir. 1995) in support of his Due Process claim, and Brown v. Board of
8 Educ. of Topeka, 347 U.S. 483 (1954) and Bolling v. Sharpe, 347 U.S. 497
9 (1954) in support of his Equal Protection claim, the Court finds each of these
10 cases factually distinguishable from the matter at hand.

11 Additionally, assuming that the College mail room is a "public
12 accommodation" as defined by the Civil Rights Act of 1964, as the Court
13 explained above, Plaintiff has failed to plead facts sufficient to show that
14 Hedgecoth deprived him of its use based on discrimination "on the ground of
15 race, color, religion, or national origin." 42 U.S.C. § 2000a. Plaintiff's claim
16 that he was stopped from completing service of process also fails because he
17 voluntarily removed his envelopes from the student basket, then put them
18 back in after he was denied a receipt, and finally told the Campus police
19 officer that he wanted to retrieve them from the mail room, which request was
20 granted when the officer returned the envelopes to Plaintiff (FAC ¶¶ 24-25,

1 37, 42, 47). Even if Plaintiff was denied the opportunity to mail his envelopes
2 from the student mail room, Plaintiff had alternate means of completing
3 service of process since he is unrestricted in the use of the U.S. Postal
4 Service and/or in-person service. But cf. Morrison v. Hall, 261 F.3d 896, 906
5 (9th Cir. 2001) (in the prison context, restrictions on the delivery of mail have
6 been recognized as a burden on a prisoner's exercise of his or her First
7 Amendment rights).

8 Therefore, Plaintiff fails to state facts sufficient to support a § 1983
9 claim grounded in the Due Process and Equal Protection clauses of the
10 Fourteenth Amendment against both Defendants, and Counts Four and Five
11 of the FAC are DISMISSED.

12 D. Count Two

13 Unlike Plaintiff's aforementioned claims, Plaintiff's remaining claims of
14 illegal search, seizure and excessive force, broadly construed, state a claim
15 on which relief can be granted, but only against Officer Torres.

16 A police officer's right to make an on-the-street "stop" and an
17 accompanying "frisk" is bounded by the protections afforded by the Fourth
18 Amendment, and made applicable to the states by the Fourteenth
19 Amendment. Terry v. Ohio, 392 U.S. 1 (1968). The Fourth Amendment
20 provides that "the right of the people to be secure in their persons, houses,

1 papers, and effects, against unreasonable searches and seizures, shall not
2 be violated. . .” U.S. Const. art. IV. In testing the reasonableness of a search
3 and seizure, the courts must balance the need to search or seize against the
4 personal invasion which they entail, “[a]nd in justifying the particular intrusion
5 the police officer must be able to point to specific and articulable facts which,
6 taken together with rational inferences from those facts, reasonably warrant
7 that intrusion.” Terry, 392 U.S. at 22.

8 Plaintiff states facts sufficient to raise a Fourth Amendment
9 unreasonable search and seizure claim. Plaintiff maintains that Officer Torres
10 stopped him a few minute after he exited the Campus mail room following
11 Plaintiff’s altercation with Hedgecoth, who threatened to call the police on him
12 and refused to accept his envelopes for mailing (FAC ¶¶ 35, 41). Officer
13 Torres told Plaintiff to put his things down, sit on a bench and talk with him, or
14 otherwise be handcuffed (FAC ¶¶ 41-43). When Plaintiff stated his intention
15 to retrieve his envelopes and leave the Campus, Officer Torres allegedly
16 grabbed and forcefully apprehended Plaintiff with another unnamed officer’s
17 assistance (FAC ¶¶ 44-45). Plaintiff was handcuffed, searched, and
18 questioned, and the officers told him that they were responding to a call that
19 Plaintiff had disturbed the peace (FAC ¶ 46). After speaking with Hedgecoth,
20 the officers told Plaintiff that she was not pressing charges, removed the

1 handcuffs and released Plaintiff upon being “very apologetic and red faced
2 about the whole ordeal” (FAC ¶¶ 47-48).

3 These factual allegations, taken as true and construed in a light most
4 favorable to the plaintiff, suffice to raise a claim that Plaintiff was
5 unreasonably stopped and searched by Officer Torres. However, Plaintiff’s
6 allegation that Hedgecoth “solicit[ed] the help of Campus police under false
7 pretenses, to assist in her illegal attempt to deny Service of Process [sic.]” is
8 conclusory and insufficient to state a Fourth Amendment claim against
9 Hedgecoth, because Plaintiff does not allege facts showing that she caused
10 Plaintiff’s unlawful detention (FAC ¶ 50).

11 Lastly, Plaintiff’s Fourth Amendment claim of excessive force is also
12 deemed sufficient to survive Defendants’ 12(b)(6) motion. Claims of
13 excessive force arising before or during arrest are examined under the Fourth
14 Amendment’s prohibition on unreasonable seizures. Graham v. Connor, 490
15 U.S. 386, 394 (1989); see also Hammer v. Gross, 932 F.2d 842, 845 (9th Cir.
16 1991). The reasonableness analysis requires balancing the “nature and
17 quality of the intrusion” on a person’s liberty with the “countervailing
18 governmental interests at stake” to determine whether the use of force was
19 objectively reasonable in light of all the relevant circumstances. Graham, 490
20 U.S. at 396; Hammer, 932 F.2d at 846. Factors to be considered in the

1 reasonableness inquiry include: “(1) the severity of the crime at issue, (2)
2 whether the suspect poses an immediate threat to the safety of the officers or
3 others, and (3) whether the suspect is actively resisting arrest or attempting to
4 evade arrest by flight.” Graham, 490 U.S. at 396.

5 The FAC alleges that Officer Torres and an unnamed officer grabbed
6 Plaintiff’s arms, twisting them behind his back while pushing him toward the
7 ground and telling him not to resist, and caused him severe pain, high blood
8 pressure, and permanent injury to his back and shoulder (FAC ¶¶ 45, 49, 52).
9 Plaintiff contends that as the officers handcuffed him, he repeatedly said: “I’m
10 cool” and “I am not resisting” (FAC ¶ 45). In light of the Graham factors and
11 based on Plaintiff’s allegations, including: that the officers were responding to
12 a minor infraction such as “disturbing the peace” and were not faced with an
13 armed or resisting suspect, the Court finds the allegations sufficient to state a
14 claim of excessive force against Officer Torres. Since Plaintiff does not
15 allege that Hedgecoth caused the officers to use excessive force against him,
16 this claim, as all the others, is dismissed against Hedgecoth (FAC ¶ 50).

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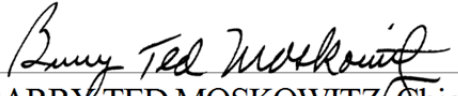
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1 **IV. Conclusion**

2 Defendants' motion to dismiss is **GRANTED IN PART** and **DENIED IN**
3 **PART**. Defendants' motion is **GRANTED** as to Counts One (First
4 Amendment), Three (Cruel and Unusual Punishment under the Eighth
5 Amendment), Four (Due Process Clause of the Fourteenth Amendment) and
6 Five (Equal Protection Clause of the Fourteenth Amendment) and **DENIED**
7 as to Count Two (Illegal Search, Seizure, and Excessive Force under the
8 Fourth and Fourteenth Amendments) against Defendant Officer Torres.
9 Counts One, Three, Four, and Five are **DISMISSED** without further leave to
10 amend and all counts against Defendant Hedgecoth are **DISMISSED** without
11 leave to amend. No motions for reconsideration shall be entertained.
12 Defendant Officer Torres shall file an answer to Count Two of the Plaintiff's
13 FAC within 20 days of the entry of this order.

14
15 **IT IS SO ORDERED.**

16 Dated: January 2, 2015

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BARRY TED MOSKOWITZ, Chief Judge
United States District Court